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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9 WESTERN DIVISION
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11 STEVEN WIMBERLY,) No. ED CV 08-00605-DSF (VBK)
12)
13) Petitioner,) MEMORANDUM AND ORDER DENYING
14) v.) RESPONDENT'S MOTION TO DISMISS
15) F. B. HAWS,) AND GRANTING PETITIONER'S REQUEST
16) FOR A STAY
17) Respondent.)
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17 INTRODUCTION

18 On April 10, 2008, Steven Wimberly, Sr. ("Petitioner") filed a
19 "Petition for Writ of Habeas Corpus by a Person in State Custody,"
20 pursuant to 28 U.S.C. §2254. Petitioner raises the following claims:
21 (1) Petitioner's Sixth and Fourteenth Amendment Constitutional rights
22 were violated as to count one burglary charge because Petitioner was not
23 arraigned on the burglary charge; (2) Petitioner's Eighth and Fourteenth
24 Amendment Constitutional rights were violated due to juror misconduct;
25 (3) Petitioner's Sixth Amendment constitutional rights were violated as
26 the consecutive sentences were based on facts not admitted or found true
27 by a jury beyond a reasonable doubt in violation of Petitioner's right
28 to a jury trial and establishes a Cunningham violation; (4) Petitioner's

1 Fourteenth Amendment constitutional rights were violated by intentional
2 prosecutorial misconduct where the prosecutor withheld evidence and
3 knowingly used perjured testimony; (5) Petitioner's Sixth Amendment
4 constitutional rights were violated as Petitioner was denied effective
5 assistance of counsel; (6) Petitioner's Fifth Amendment constitutional
6 rights to confront and cross-examine witnesses brought against him
7 prejudicial evidence; (7) Petitioner's Fourteenth Amendment
8 constitutional right to a fair trial due to his incompetency to stand
9 trial by two clinical psychologists; and (8) Petitioner's Eighth
10 Amendment constitutional right was violated as Petitioner's sentence was
11 constitutionally excessive in violation of the cruel and unusual
12 punishment ban. (See Petition at attached pp. 5A and 5B; 6A-6F.)

13 On June 13, 2008, Respondent filed a "Motion to Dismiss Petition
14 for Writ of Habeas Corpus and Memorandum of Points and Authorities in
15 Support Thereof" ("MTD") on the grounds that the Petition contains
16 unexhausted claims. Specifically, Respondent contends that Grounds 1,
17 4, 5, 6 and 7 were not exhausted in the California Supreme Court.

18 On June 19, 2008, the Court issued a Minute Order ordering
19 Petitioner to file an Opposition or Statement of Non-Opposition to the
20 MTD. Further, in light of Rhines v. Weber, 544 U.S. 269, 125 S.Ct.
21 1528, 1535 (2005), if Petitioner concedes that the claims contained in
22 Grounds 1, 4, 5, 6 and 7 were not exhausted, Petitioner could request a
23 Stay. Petitioner was advised that he must show whether "good cause"
24 exists for Petitioner's failure to exhaust these claims and whether
25 Petitioner has been diligent.

26 On June 30, 2008, Petitioner filed an Opposition to Respondent's
27 Motion to Dismiss. In this document, Petitioner requested the Court to
28 grant him a Stay if the Court found the claims unexhausted. (Opposition

1 at 2.)

2 The matter has been deemed submitted and is now ready for decision.
3 Having reviewed the allegations in the Petition, the matters set forth
4 in the Motion to Dismiss and Opposition, it is hereby ordered that the
5 Motion to Dismiss be denied and Petitioner's request for a Stay be
6 granted.

7
8 **BACKGROUND**

9 A San Bernardino County Superior Court jury convicted Petitioner of
10 residential burglary and second degree burglary in violation of
11 California Penal Code ("PC") §§459, 460, attempted theft of more than
12 \$400 from an elder in violation of PC §§664, 368(a), possession of a
13 forged check with intent to defraud in violation of PC §475(a), and
14 forgery with intent to defraud in violation of PC §470(d). The trial
15 court sentenced Petitioner to state prison for an aggregate term of 54
16 years to life. (Respondent's Lodgment 1.)

17 On October 31, 2006, the California Court of Appeal affirmed the
18 judgment with directions to the trial court to amend Petitioner's
19 Abstract of Judgment to reflect his 25-years-to-life sentences on Counts
20 2, 4 and 5, which were originally imposed concurrent to Petitioner's
21 sentence on Count 1, are stayed under PC §654. (Respondent's Lodgment
22 1.)

23 Petitioner filed a Petition for Review with the California Supreme
24 Court on December 7, 2006. (Respondent's Lodgment 2.) The California
25 Supreme Court denied the Petition for Review on January 17, 2007.
26 (Respondent's Lodgment 2.)

27 Petitioner filed the within Petition on April 10, 2008.
28

DISCUSSION

Respondent contends that the within Petition is a mixed petition and is unexhausted as Petitioner failed to exhaust Grounds 1, 4, 5, 6 and 7. Petitioner in his Petition for Review only exhausted his claims of jury misconduct, unauthorized consecutive sentences and cruel and unusual sentences contained in Grounds 2, 3 and 8.

Petitioner requests a Stay in light of Rhines v. Weber, 544 U.S. 269, 125 S.Ct. 1528, 1535 (2005), wherein the United States Supreme Court held that a federal district court may stay a mixed habeas petition to allow a petitioner to present unexhausted claims to the state court. A District Court should stay, rather than dismiss, a mixed habeas petition if the Petitioner has good cause for his failure to exhaust, his unexhausted claims are meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. Id. at 278.

In Rhines, the Supreme Court noted that because of the total exhaustion requirement in Rose v. Lundy, 455 U.S. 509, 518-19, 102 S.Ct. 1198 (1982) and AEDPA's one-year statute of limitations, petitioners with mixed petitions "run the risk of forever losing their opportunity for any federal review of their unexhausted claims." Rhines, 125 S.Ct. at 1533. This risk arises because a petitioner could be faced with a choice of either striking his unexhausted claims and going forward with an exhausted petition or allowing the whole petition to be dismissed, without prejudice, as mixed. Under the first option, if Petitioner's original petition had already been decided on the merits, he could not include the newly exhausted claims in a subsequent petition, as the second petition would be subject to the strict limitations AEDPA places on successive petitions. See 28 U.S.C. §2244(b). The second option

1 available under Rose is no more desirable for a petitioner given the
2 fact that AEDPA's one-year statute of limitations will likely have run
3 before a petitioner is able to fully exhaust state court remedies on the
4 mixed petition and return to federal court. Rhines, 125 S.Ct. at 1533-
5 34.

6 In light of the above circumstances, Rhines concluded that a
7 District Court has discretion to stay a mixed petition to allow a
8 petitioner time to return to state court to present unexhausted claims.
9 In making this determination, however, the Court held that the stay and
10 abeyance procedure must be applied consistently with AEDPA's twin
11 purposes: "reducing delays in the execution of state and federal
12 criminal sentences" and encouraging "petitioners to seek relief from
13 state courts in the first instant." Rhines, 125 S.Ct. at 1534. As a
14 result, Rhines cautioned, a stay and abeyance should be available only
15 in limited circumstances, and is appropriate only when the District
16 Court determines that there was "good cause" for the failure to exhaust.
17 Rhines, 125 S.Ct. at 535.

18 19 STAY AND ABEYANCE

20 A. Good Cause Standard.

21 In Riner v. Crawford, 415 F.Supp.2d 1207, 1211 (D. Nev. 2006), the
22 District Court held that "the good cause standard applicable in
23 consideration of a request for a stay and abeyance of a federal habeas
24 petition requires the petitioner to show that he was prevented from
25 raising the claim, either by his own ignorance or confusion about the
26 law or the status of the case or by circumstances over which he has
27 little or no control, such as the actions of counsel either in
28 contravention of the petitioner's clearly expressed desire to raise the

1 claim or when petitioner had no knowledge of the claim's existence."
2 Id. at 1211.

3 Here, Petitioner's good cause for failing to exhaust his new claims
4 sooner is that he is terminally ill with prostate cancer, has been
5 heavily medicated and was undergoing chemotherapy. Petitioner alleges
6 he relied on jailhouse lawyers who are not competent writ writers.
7 Further, Petitioner alleges that prison authorities have failed to
8 provide current legal materials and access to the law library. (See
9 Opposition at 3; Declarations of Steven Wimberly and Delbert Paulino.)
10 Thus, Petitioner contends that he was hampered from filing sooner by
11 factors outside his control and good cause exists to grant a Stay.

12
13 **B. Petitioner Contends That His Claims Contained In Grounds 1, 4,**
14 **5, 6 and 7 Are Meritorious.**

15 Petitioner contends that his burglary conviction is
16 unconstitutional because he was not arraigned on the burglary charged in
17 Count 1; that the prosecutor engaged in misconduct by withholding
18 evidence and knowingly using perjured testimony; that Petitioner was
19 denied effective assistance of counsel; that Petitioner was denied his
20 right to confront and cross-examine witnesses because the trial court
21 permitted the use of partial transcripts and a suggestive identification
22 and that Petitioner was incompetent to stand trial. Petitioner contends
23 that these claims are meritorious.

24
25 **C. Diligent Conduct by Petitioner.**

26 Petitioner contends that he has acted with diligence and has not
27 engaged in any intentional delay tactics. Petitioner alleges he was
28 unable to file his state habeas petitions sooner due to being terminally

1 ill with cancer, being on medications and chemotherapy and limited law
2 library access.

3 Petitioner requests a Stay in light of Rhines v. Weber in that good
4 cause exists, his claims are potentially meritorious and he has not
5 engaged in dilatory litigation tactics.

6 Petitioner's unexhausted claims appear colorable and there is no
7 indication that Petitioner engaged in delaying tactics. Prior to
8 staying a mixed petition, a Court need not require that the Petitioner
9 delete the unexhausted issues, as previously required by Ninth Circuit
10 case law. Jackson v. Roe, 425 F.3d 654, 659-61 (9th Cir. 2005).

11
12 **ORDER**

13 **IT IS HEREBY ORDERED** that (1) Respondent's Motion to Dismiss is
14 **DENIED**; (2) Petitioner's Request for a Stay is **GRANTED**, provided
15 Petitioner files a Status Report with this Court every 30 days advising
16 the Court on the status of his state habeas petition pending in the
17 California Supreme Court, and within 60 days from the date of the
18 California Supreme Court's decision (assuming the California Supreme
19 Court denies the petition) notifies this Court of the decision.

20 Petitioner is cautioned that should he fail to act within these
21 time frames, the Court will order the Stay vacated nunc pro tunc and he
22 will not be allowed to raise additional claims in this action.

23
24 DATED: November 3, 2008

_____/s/
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE